

September 20, 2005

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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

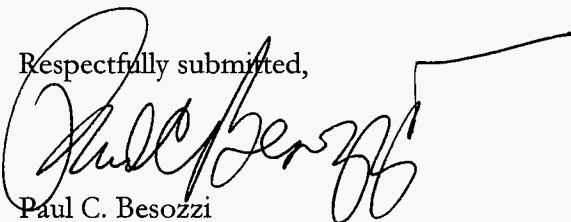
**Re: WC Docket No. 04-30 – Emergency Request for Declaratory Ruling – Additional
Ex Parte Filing By Gemini Networks CT, Inc. (“Gemini”) – Report of
Undisclosed Ex Parte Contacts**

Dear Ms. Dortch:

This additional *ex parte* filing is in further response to SBC’s September 1 filing regarding the latest Draft Decision, dated the same day (“Draft”), of the Connecticut Department of Public Utility Control (“Department”) in its Docket 02-05-04. Gemini has filed the attached substantive exceptions to the Draft and will participate in oral argument, currently scheduled for October 19, 2005, on the Draft and such exceptions.

Pursuant to Section 1.1206(b) of the Commission’s rules, this letter is being electronically filed through the ECFS.

Respectfully submitted,



Paul C. Besozzi
Counsel for Gemini Networks CT, Inc.

cc: Office of Chairman Martin
Office of Commissioner Abernathy
Office of Commissioner Copps
Office of Commissioner Adelstein
Office of the General Counsel
Wireline Competition Bureau

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September 19, 2005

Ms. Louise E. Rickard
Acting Executive Secretary
Department of Public Utility Control
Ten Franklin Square
New Britain, Connecticut 06051

Re: Docket No. 05-02-04; Petition of Gemini Networks CT, Inc. for Arbitration

Dear Ms. Rickard:

Enclosed for filing on behalf of Gemini Networks CT, Inc. ("Gemini") please find Gemini's Written Exceptions to the August 31, 2005 Draft Decision issued in this docket.

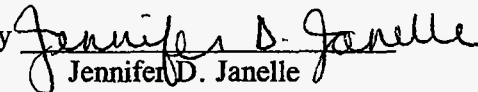
Gemini respectfully requests that it be allowed to present oral argument on the Draft in accordance with the procedural schedule established by the Department.

This filing has been made via the Department's web-based filing system and is complete. Service has been made in accordance with R.C.S.A. § 16-1-15.

If you have any questions with respect to this filing, please contact the undersigned.

Respectfully submitted,

GEMINI NETWORKS CT, INC.

By 
Jennifer D. Janelle
Its Attorney

STATE OF CONNECTICUT
DEPARTMENT OF PUBLIC UTILITY CONTROL

RE: PETITION OF GEMINI NETWORKS)	DOCKET NO. 05-02-04
CT, INC. FOR ARBITRATION PURSUANT)	
TO SECTIONS 252(b) AND 252(i) OF THE)	
TELECOMMUNICATIONS ACT OF 1996 TO)	
ESTABLISH AN INTERCONNECTION)	
AGREEMENT WITH THE SOUTHERN NEW)	
ENGLAND TELEPHONE COMPANY)	SEPTEMBER 19, 2005

WRITTEN EXCEPTIONS OF GEMINI NETWORKS CT, INC.

Gemini Networks CT, Inc. ("Gemini") herein files its written exceptions to the Draft Decision issued by the Department on August 31, 2005, purporting to dismiss Gemini's request for arbitration (the "Draft"). For the following reasons, Gemini respectfully submits that the Draft is a grave error and respectfully requests that the Department rescind the Draft and proceed with the arbitration.

It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. Cohens v. Virginia, 6 Wheat. 264, 404 (1821).

At the outset, Gemini notes the difficult, contentious nature of this proceeding, as well as the acrimony it has generated. Nevertheless, the Department has never before shied away from difficult proceedings, and Gemini expects that the Department will attack this proceeding with its usual thoughtfulness and zeal. Although the above-cited quotation was made with respect to the Supreme Court, it is equally instructive in this case and reflects the long-standing policy of the Department. The Department has a long history of exercising its jurisdiction in the best interest of Connecticut consumers and now is not the time to abandon that practice.

I. The Department Has Provided No Basis for the Draft.

Gemini filed its Petition for Arbitration on February 8, 2005. The Department accepted jurisdiction over the matter, assigned an arbitrator, see Docket No. 05-02-04, letter from Louise E. Rickard dated March 11, 2005, and issued a procedural order. In fact, the Department made substantive rulings going to the very heart of the arbitration. See Docket No. 05-02-04, letter from Louise E. Rickard dated April 5, 2005 (ruling that Gemini was entitled to access to the “Big UNE” as opposed to SBC’s claimed “Little UNE.”). Circumstances arose that led Gemini to exercise its right to request that the assigned arbitrator be disqualified. See Docket No. 05-02-04, Motion of Gemini to Disqualify Arbitral Staff, June 23, 2005. Gemini’s claim that circumstances warranted the disqualification of the arbitrator was confirmed when the arbitrator contemporaneously disqualified himself. See Docket No. 05-02-04, Arbitral Recusal Letter, June 23, 2005. Now, without any pending motion, request or procedure of any kind from either party, the Department has purported to dismiss Gemini’s Petition.

The Uniform Administrative Procedure Act provides that “[a] proposed final decision made under this section shall be in writing and contain a statement of the reasons for the decision and a finding of facts and conclusion of law on each issue of fact or law necessary to the decision.” Conn. Gen. Stat. § 4-179(b). The Draft issued by the Department provides no facts or reasoned analysis as to why the Department has abruptly reversed course and refused jurisdiction over Gemini’s arbitration request. Gemini is aware of no facts or intervening circumstances that would lead the Department to issue the Draft, other than the unfortunate circumstances surrounding the passage and subsequent veto of SB 1097.¹

¹ Gemini cannot believe that the Department would reject its arbitration petition as a result of Gemini’s exercise of its rights with respect to SB 1097, as such action would be retaliatory in nature, and thus clearly unlawful.

Gemini is further puzzled by the Draft in light of the fact that the Department routinely arbitrates interconnection disputes. In fact, Gemini believes that it is the only competitive telecommunications carrier that has had its interconnection request dismissed by the Department as non-jurisdictional. The Department has exercised jurisdiction over interconnection disputes notwithstanding pending FCC dockets on precisely the same issues as are being arbitrated by the Department. See e.g., Docket No. 01-08-19RE01, *Petition of Pae Tec Communications, Inc. for Resolution of a Disagreement with the Southern New England Telephone Company – FCC Verizon Order*; Docket No. 04-06-04, *Petition of Level 3 Communications, LLC for Arbitration to Establish an Interconnection Agreement with SNET d/b/a SBC Connecticut*. The fact that the Department has exercised its arbitral authority over contested issues during the pendency of FCC dockets makes the action taken in this proceeding seem all the more arbitrary and capricious.

II. The Department Cannot “Decline” Jurisdiction.

The Draft misstates the law with respect to the Department’s responsibilities over arbitration proceedings. Section 252(b) of Title 47 of the United States Code appropriately contains the words “compulsory arbitration” in the title. Arbitration is compulsory because no party, including the State Commission, has the ability to decline to participate simply because they do not want to. The statute provides that “[d]uring the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.” 47 USC § 252 (b)(1). Gemini filed such a petition on February 8, 2005. After such a petition is filed, “[t]he State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall

conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.” 47 USC § 252(b)(4)(c) (emphasis added). The statute is not permissive. “The mandatory ‘shall,’ . . . normally creates an obligation impervious to judicial discretion.” Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998). “The word ‘shall’ is ordinarily ‘the language of command.’” Anderson v. Yungkau, 329 U.S. 482, 485 (1947) (quoting Escoe v. Zerbst, 295 U.S. 490, 493 (1935)). In fact, the word “shall” is used throughout Section 252 in reference to the action to be taken by the State Commission upon receiving a request for arbitration.²

The Draft states that, “[p]ursuant to Section 252(e)(5) of the Telcom Act, the FCC may preempt a State’s [sic] commission’s jurisdiction over an arbitration proceeding, and thereby assume the responsibility of the State commission with respect to the arbitration proceeding, and act for the State commission.” Draft at 2. While this is a fair statement of the FCC’s preemption jurisdiction, the Draft fails to state, or discuss in any way, the circumstances pursuant to which such preemptive jurisdiction is exercised. Section 252(e)(5) of Title 47 provides:

If a State commission **fails to act to carry out its responsibility** under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission’s jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

47 USC § 252(e)(5) (emphasis added). The statute does not provide for FCC jurisdiction when a State Commission does not want to act, nor does the statute allow for State Commissions to engage in deliberate acts of dereliction of a State Commission’s duties. The statute is intended to

² Furthermore, 47 U.S.C. § 252 contains both the words “may” and “shall,” further confirming that the drafters intended the terms to have different meanings and that the drafters acted with complete awareness of the different meanings. See Office of Consumer Counsel v. Dep’t of Pub. Util. Control, 252 Conn. 115, 121-22 (2000).

protect parties to an arbitration when the State Commission fails to carry out its duties. There is no provision for a voluntary referral by a State Commission to the FCC of an arbitration matter.

The FCC has directly addressed this issue.

Regarding what constitutes a state's "failure to act to carry out its responsibility under" section 252, the Commission was presented with numerous options. The Commission will not take an expansive view of what constitutes a state's "failure to act." Instead, the Commission interprets "failure to act" to mean a state's failure to complete its duties in a timely manner. This would limit Commission action to instances where a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C). The Commission will place the burden of proof on parties alleging that the state commission has failed to respond to a request for mediation or arbitration within a reasonable time frame. **We note the work done by states to date in putting in place procedures and regulations governing arbitration and believe that states will meet their responsibilities and obligations under the 1996 Act. See, e.g., *In the Matter of the Implementation of the Mediation and Arbitration Provisions of the Federal Telecommunications Act of 1996*, Case No. 96-463-TP-UNC, Ohio Commission, (May 30, 1996); *Illinois Commerce Commission On Its Own Motion Adoption of 83 Ill. Adm. Code 761 to Implement the Arbitration Provisions of Section 252 of the Telecommunications Act of 1996*, Docket No. 96-0297, Illinois Commission (June 14, 1996).**

Final Rule, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Implementation of Sections 3(n) and 332 of the Communications Act, CC Docket No. 96-98, CC Docket No. 95-185, GN Docket No. 93-252; FCC 96-325, 61 FR 45476, Vol. 61, No. 169 (Aug. 29, 1996) at par. 843 (emphasis added) (citations in original). In this case, the parties to the arbitration have waived the applicable time limit prescribed for the Department to carry out its duties. Thus, there is no petitioning party seeking preemption by the FCC in order to trigger the FCC's ability to exercise preemptive jurisdiction over the matter.

Exhaustive research performed by Gemini did not turn up one instance of a State Commission voluntarily relinquishing its jurisdiction over interconnection arbitrations, with the exception of Virginia, which ceded its jurisdiction as a result of its concern over losing its sovereign immunity through an appeal in federal district court. Moreover, this Department, as well as the State of Connecticut itself, has always been very protective of its jurisdiction over public service companies, and, to Gemini's knowledge, has never voluntarily ceded jurisdiction over a matter to a federal agency. To do so now may severely jeopardize the Department's ability to maintain jurisdiction over future matters where a party might seek preemptive jurisdiction at the FCC.

Voluntarily ceding jurisdiction in this instance also presents the opportunity for fundamental state law principles to be undermined or ignored. The FCC has stated:

We reject the suggestion made by some parties that, if the Commission steps into the state commission role, it is bound by state laws and standards that would have applied to the state commission. While states are permitted to establish and enforce other requirements, these are not binding standards for arbitrated agreements under section 252(c). Moreover, the resources and time potentially needed to review adequately and interpret the different laws and standards of each state render this suggestion untenable.

Id. at 844.

III. The Department Has Already Accepted Jurisdiction.

As previously stated, the Department has already accepted jurisdiction over this arbitration. The arbitration is the direct result of the Department's orders in Docket No. 03-01-02 that the parties negotiate an interconnection agreement. There is no basis in law or fact for the Department to now abrogate its duties to hear this arbitration. In fact, there is no guarantee that the FCC will even accept jurisdiction over this arbitration.

The FCC has routinely denied preemptive jurisdiction where a State Commission has accepted jurisdiction, begun proceedings and ultimately dismissed the arbitration. See, e.g., In the Matter of Petition of Autotel Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Public Utilities Commission of Nevada Regarding Arbitration of an Interconnection Agreement with SBC Nevada, WC Docket No. 04-311, 19 FCC Rcd 20920, 2004 FCC LEXIS 6013 (Oct. 22, 2004) (“Autotel”) (rejecting an arbitration request where the Nevada Commission responded to the request for arbitration, docketed the matter, issued a public notice, held pre-hearing conferences, issued a procedural schedule, and ruled on pre-hearing issues, then subsequently dismissed the petition on procedural grounds). See also In the Matter of Global NAPs, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding interconnection Dispute with Bell Atlantic New Jersey, Inc., CC Docket No. 99-154, 14 FCC Rcd 12530, 1999 FCC LEXIS 3695 (Aug. 3, 1999), among others.

While there is no FCC ruling directly on point, the Autotel case is instructive. As in Autotel, the Department has responded to Gemini’s request for arbitration, docketed the matter, issued a public notice, held a pre-hearing conference, issued a procedural schedule and ruled on a substantive, critical pre-hearing issue. Now, the Department seeks to dismiss the arbitration request, absent any new facts or legal issues, and absent any motion or request to dismiss. One can easily assume that, based on these facts, the FCC may decline to preempt the Department. Such action will leave Gemini without any remedy and will render the Department’s earlier decisions ordering the unbundling of the abandoned HFC network a nullity.

It is noteworthy that, under the FCC’s rules, Gemini will have the burden of proving that the Department failed to act. Implementation of the Local Competition Provisions in the

Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 16128 par. 1285 (1996) (“Local Competition Order”) (subsequent history omitted). The FCC has further stated that it would not take an “expansive view” of what constitutes a state’s failure to act, noting that “states will meet their responsibilities and obligations under the 1996 Act.” Id. “Thus, under our current rules, a state commission does not “fail to act” when it dismisses or denies an arbitration petition on the ground that it is procedurally defective, the petitioner lacks standing to arbitrate, or the state commission lacks jurisdiction over the proceeding.” In the Matter of Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.’s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission; Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.’s Petition for Arbitration with BellSouth Before the Georgia Public Service Commission; Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.’s Petition for Arbitration with GTE South Before the Public Service Commission of South Carolina, CC Docket Nos. 97-163, 97-164, 97-165, 13 FCC Rcd 1755, 1774 par. 33, 1997 FCC LEXIS 5569, (Oct. 7, 1997).

Accordingly, the Draft may well leave Gemini without recourse to any forum in which to advocate for its rights – rights determined to exist by the Department’s decisions and orders in Docket Nos. 03-01-02 and 03-01-02RE01. Furthermore, the delay that will necessarily follow from the Draft will further prejudice Gemini and reward SBC. The long and contentious history between Gemini and SBC concerning access to the HFC network can be summed up by the phrase “justice delayed is justice denied.” While Gemini has been fighting in every conceivable venue to avail itself of its declared right to unbundled access to the HFC network, SBC has been

moving forward with its Project Lightspeed, a service that will directly compete with the services that Gemini had hoped to offer over the abandoned HFC network. The continued delay of Gemini's arbitration and the issues raised in this docket will allow SBC to gain continued competitive advantages by being first in the market with these new enhanced services. This cannot be the intent or policy of the Department.

IV. The Department Has A Vested Interest in This Proceeding.

The Department has appeared before the FCC and argued in Docket No. 04-30 that the Department's rulings in Docket Nos. 03-01-02 and 03-01-02RE01 were appropriate and within the Department's jurisdiction. The Department's refusal to enforce its own orders and conduct the arbitration proceeding which the Department itself ordered amounts to a de facto abandonment of the Department's earlier decisions as well as the Department's position on appeal. In fact, the Department has filed more than 30 pages of comments in support of its jurisdiction over the HFC network and participated in ex parte proceedings before the FCC arguing on behalf of its jurisdiction over the FCC. The Department has argued that the HFC network is unique, and thus the Department is uniquely situated to issue rulings on its unbundling.

However, now, for no apparent or explained reason, the Department has abandoned its prior assertions of jurisdiction over the unbundling of the HFC network and directed Gemini to seek relief elsewhere. This total abandonment of its earlier decisions, positions on appeal and jurisdiction is arbitrary, capricious and ultimately suspect. Gemini urges the Department to rescind the Draft and proceed with Gemini's arbitration request.

V. The Draft Ultimately Harms More Than Just Gemini.

The Department has steadfastly maintained since the promulgation of P.A. 94-83 that it is committed to the delivery of telephony competition in Connecticut. The Gemini proceedings have been watched with more than just passing curiosity by competitive providers and consumer advocates. Both the Department and the FCC have recognized that true facilities-based competition will not and cannot occur until there is another “pipeline” into the end-user premises. For residential customers, that second pipeline has never been closer to becoming a reality than with the issuance of the Gemini decisions. These decisions have the potential of providing a way to access end-user residential customers that does not amount to the traditional cable-telephone duopoly. The Gemini decisions provide access to abandoned facilities, constructed with ratepayer money, that are occupying the last usable space on Connecticut telephone poles.

Despite the fact that Gemini first won the right to access the abandoned HFC facilities in 2003, as of today, no access has been provided. Most other competitors faced with SBC’s war of attrition have packed up and left Connecticut for states where there is an actual ability to fairly compete. However, Gemini has continued to pour millions of dollars into this cause, trying to exercise the rights it has been granted by law. Never has there been a more dedicated competitor in the state. Pursuant to the Draft, Gemini’s reward for its persistence and dedication to Connecticut consumers is to have its arbitration abruptly dismissed for no apparent reason. Moreover, referral of this matter to the FCC will likely lead to no resolution for a very long time. The FCC has itself stated:

Finally, we conclude that it would not make sense to apply to the Commission the timing requirements that section 252(b)(4)(c) imposes on state commissions. The

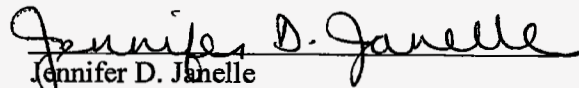
Commission, in some instances, might not even assume jurisdiction until nine months (or more) have lapsed since a section 251 request was initiated.

Final Rule, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Implementation of Sections 3(n) and 332 of the Communications Act, CC Docket No. 96-98, CC Docket No. 95-185, GN Docket No. 93-252; FCC 96-325, 61 FR 45476, Vol. 61, No. 169 (Aug. 29, 1996) at par. 844. The Department is charged with the regulation of public service companies in the State of Connecticut. No competitor should have to wait years or seek other forums to exercise its statutory rights.

Gemini urges the Department not to fall prey to SBC's war of attrition. There is no reason to give up jurisdiction over the important issues raised in this docket – and the Department has a vested interest in enforcing its decisions and seeing the policy that it has painstakingly developed for telecommunications competition to come to fruition. Additionally, Connecticut consumers that have waited so long for an opportunity to see true competition and the benefit of the dollars that they spent to construct the HFC network deserve to have the Department enforce its own orders and see this proceeding through.

Respectfully submitted,

GEMINI NETWORKS CT, INC.

A handwritten signature in black ink, reading "Jennifer D. Janelle". The signature is written in a cursive style with a horizontal line underneath the name.

Jennifer D. Janelle

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